(2)

Supreme Court, U.S.
FILED
OCT 5 1998
OFFICE OF THE CLERK

No. 98-237

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

ROBERTSON, STEPHENS & COMPANY,
Petitioner,

v.

TONYJA DUFFIELD,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF IN OPPOSITION

CLIFF PALEFSKY
MCGUINN, HILLSMAN & PALEFSKY
535 Pacific Avenue
San Francisco, CA 95133
(415) 421-9292

MICHAEL RUBIN
(Counsel of Record)
SCOTT A. KRONLAND
ALTSHULER, BERZON, NUSSBAUM, BERZON & RUBIN
177 Post Street, Suite 300
San Francisco, CA 94108
(415) 421-7151

Attorneys for Respondent Tonyja Duffield

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

29 pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE	3
1. Ms. Duffield's Complaint	3
2. The District Court's Rulings	6
3. The Ninth Circuit's Decision	6
REASONS FOR DENYING THE WRIT	8
I. THIS IS NOT AN APPROPRIATE CASE FOR ANSWERING THE QUESTION PRESENTED BECAUSE THE NEW YORK STOCK EXCHANGE HAS ABANDONED THE REQUIREMENT OF MANDATORY ARBITRATION OF STATUTORY EMPLOYMENT DISCRIMINATION CLAIMS	8
II. THIS CASE IS ALSO NOT THE RIGHT VEHICLE FOR ANSWERING THE QUESTION PRESENTED BECAUSE IT ARISES IN THE CONTEXT OF A UNIQUE MANDATORY ARBITRATION SYSTEM THAT HAS BEEN RECOGNIZED AS INADEQUATE TO VINDICATE STATUTORY DISCRIMINATION CLAIMS AND THAT IS INVOLUNTARILY IMPOSED ON AN INDUSTRY-WIDE BASIS	10
III. THE CONFLICT AS TO THE QUESTION PRESENTED MAY WELL RESOLVE ITSELF AND, EVEN IF IT DOES NOT, THIS COURT WOULD BENEFIT FROM THE VIEWS OF OTHER CIRCUITS	20
CONCLUSION	22

TABLE OF AUTHORITIES

CASES — Page

Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974) 11
Bercovitch v. Baldwin Schools, Inc., 133 F.3d 141 (1st Cir. 1998) 18
Cole v. Burns International Security Servs., 105 F.3d 1465 (D.C. Cir. 1997) 11, 14
Desiderio v. NASD, Inc., 2d Cir. No. 98-6100 21
Farrand v. Lutheran Broth., 993 F.2d 1253 (7th Cir. 1993) 6
Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991) ..... *passim*
Green v. McElroy, 360 U.S. 474 (1959) 17
Koveleskie v. SBC Capital Markets, Inc., 7th Cir. No. 98-1793 21
Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52 (1995) 18
Prudential Insurance Co. v. Lai, 42 F.3d 1299 (9th Cir. 1994), *cert. denied*, 116 S. Ct. 61 (1995) 5, 6
Pryner v. Tractor Supply Co., 109 F.3d 354 (7th Cir.), *cert. denied*, 118 S. Ct. 294 (1997) 18
Ramirez-De-Arellano v. American Airlines, Inc., 133 F.3d 89 (1st Cir. 1997) 18
Renteria v. Prudential Insurance Co., 113 F.3d 1104 (9th Cir. 1997) 5, 6
Rosenberg v. Merrill Lynch, 995 F. Supp. 190 (D. Mass. 1998), *appeal pending* No. 98-1426 (1st Cir.) 12, 21
Seus v. John Nuveen & Co., 146 F.3d 175 (3d Cir. 1998) 20, 21
Wright v. Universal Maritime Service Corp., No. 97-889, *cert. granted*, 118 S. Ct. 1162 (1998) 21, 22

STATUTES

28 U.S.C. § 1292(b) 6
42 U.S.C. § 2000e-5(k) 13
Civil Rights Act of 1991, Pub. L. 102-166, § 118 .... *passim*

TABLE OF AUTHORITIES—Continued

LEGISLATIVE HISTORY

Page

137 Cong. Rec. H9548 (daily ed. Nov. 7, 1991) 18
137 Cong. Rec. S15472 (daily ed. Oct. 30, 1991) 18
137 Cong. Rec. S15478 (daily ed. Oct. 30, 1991) 18

LAW REVIEWS

L. Bingham, *Employment Arbitration: The Repeat-Player Effect*, 1 Empl. Rights and Empl. Policy Journal 1 (1997) 15
Bompey & Pappas, *Is There A Better Way? Compulsory Arbitration of Employment Discrimination Claims After Gilmer*, 19 Empl. L.J. 197 (1994) 15
Bompey & Stempel, *Four Years Later: A Look At Compulsory Arbitration of Employment Discrimination Cases After Gilmer v. Interstate/Johnson Lane Corp.*, 21 Empl. Rel. L.J. 21 (1995) 15
D. Schwartz, *Enforcing Small Print To Protect Big Business: Employee and Consumer Rights Claims In An Age of Compelled Arbitration*, 1997 Wisc. L.R. 33 (1977) 15

SECURITIES EXCHANGE RULES

NASD Code of Arbitration Rule 10304 9
NYSE Rule 347 ..... *passim*

MISCELLANEOUS

Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship, 50 Disp. Resol. J. 37 (Oct.-Dec. 1995) 15
GAO Report HEHS-94-17, *Employment Discrimination: How Registered Representatives Fare in Discrimination Disputes* (March 30, 1994) 12

TABLE OF AUTHORITIES—Continued

	Page
Commission on the Future of Worker-Management Relations Report and Recommendations, 1994 Daily Labor Rep. (BNA) 105 (June 3, 1994)	15
National Academy of Arbitrators' Statement and Guidelines, 103 Daily Labor Rep. (BNA) E-1 (May 29, 1997)	15
SEC Approves NASD Proposal to End Mandatory Arbitration of Bias Claims, 121 Daily Labor Report (BNA) A-10 (June 24, 1998)	8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

No. 98-237

ROBERTSON, STEPHENS & COMPANY,
Petitioner,

v.

TONYJA DUFFIELD,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF IN OPPOSITION

Largely overlooked in Robertson Stephens' Petition for Writ of Certiorari is that this case arises in the unique factual context of the securities industry arbitration system—specifically, the compulsory employment arbitration procedures of the New York Stock Exchange ("NYSE"). However, four weeks after Robertson Stephens filed its Petition for Certiorari, the NYSE's Board of Directors voted to amend the NYSE's arbitration rules to *abandon* the compulsory arbitration requirement for statutory employment discrimination cases. Once that rule change is approved by the Securities Exchange Commission ("SEC"),

the only statutory employment discrimination claims that NYSE arbitration panels will be permitted to accept for hearing are those that the parties voluntarily agree to arbitrate *after* the claims arise. Employment discrimination claims like those of Ms. Duffield, which are *not* the subject of a post-dispute arbitration agreement, will *not* be arbitrable before the NYSE. Because the SEC is expected to approve the NYSE's proposed rule change in the near future, this case is almost certain to become moot as to the central arbitrability issue long before this Court could issue a decision on the merits.

Robertson Stephens' failure to address the securities industry context of this case also masks a second reason why this Court is unlikely to reach the broadly-stated Question Presented. Among Ms. Duffield's challenges to the enforceability of the Form U-4 arbitration clause was her fact-based contention, fully supported by extensive record evidence developed over several years of discovery, that securities industry arbitration in actual practice is *not* adequate to protect the statutory rights of employment discrimination plaintiffs. Although the Ninth Circuit panel did not reach that argument, plaintiff's challenge to the substantive adequacy of the securities industry arbitration system provides a narrower, fact-based ground for affirmance that logically should be considered by this Court before the more broadly-stated issue addressed by the Petition.

It also bears emphasis at the outset that nothing in the panel's decision precludes or even criticizes *voluntary* pre-dispute agreements to arbitrate statutory employment discrimination claims. Ms. Duffield fully agrees that arbitration may be an appropriate method of resolving employment disputes, and that Congress in the 1991 Civil Rights Act amendments encouraged the use of arbitration (among other consensual forms of alternative dispute resolution) *when the agreement to arbitrate is voluntary and the resulting arbitration scheme is adequate to protect*

statutory rights. The dispute *here* is not about consensual arbitration in a system that is fair to both parties, but about whether an entire industry can unilaterally strip its workers of their right to litigate statutory discrimination claims by imposing binding arbitration as a non-negotiable condition of employment, thus relegating those workers to a dispute resolution system that, in actual practice, does not provide essential substantive and procedural protections. The reason the National Academy of Arbitrators and EEOC filed *amici curiae* briefs in support of Ms. Duffield in the Ninth Circuit is not because they oppose arbitration, but because the securities industry's mandatory arbitration system is unilaterally imposed on employees and fails to provide victims of discrimination with the basic protections essential to an effective, and legally enforceable, system of arbitration.

STATEMENT OF THE CASE

1. *Ms. Duffield's Complaint*

a. Like every individual who worked as a securities trader in the United States securities industry during the period of her employment, respondent Tonyja Duffield was required—by federal law and the rules of the national securities exchanges—to submit all employment disputes to binding securities industry arbitration. Before she could begin working in the industry, Ms. Duffield was required to execute the securities industry's Form U-4 and thereby to register and be bound by the rules of every national securities exchange of which her employer was a member—in Ms. Duffield's case, the NYSE and the National Association of Securities Dealers ("NASD"). Pet. App. 9a-10a. At the time Ms. Duffield filed suit, the arbitration rules of both the NYSE and the NASD required registered representatives to arbitrate all employment disputes, at their employers' option, under the exchanges' arbitration rules and procedures. Pet. App. 10a-11a. Ms. Duffield therefore had no choice about whether

to sign the Form U-4 or its clause requiring her to submit future employment disputes to binding securities industry arbitration. Had she refused to sign, she could not lawfully have been employed as a trader for *any* U.S. securities industry employer. Pet. App. 9.

b. On January 11, 1995, Ms. Duffield filed a district court complaint alleging that her former employer Robertson Stephens had subjected her to sexual discrimination, sexual harassment and retaliation in violation of Title VII of the 1964 Civil Rights Act and California's Fair Employment and Housing Act ("FEHA"). Ms. Duffield also alleged that Robertson Stephens had engaged in common law breaches of contract, fraud, deceit, and intentional and negligent infliction of emotional distress. Pet. App. 12a, 59a. As a threshold matter, however, Ms. Duffield's first claim for relief sought a declaratory judgment that the securities industry's pre-dispute mandatory arbitration scheme was unlawful, because it deprived her of statutory and constitutional rights to litigate her employment claims in federal court before a jury of her peers. Pet. App. 12a.

In support of her claim for declaratory relief, Ms. Duffield presented five interrelated reasons why she could not be compelled to arbitrate her statutory employment discrimination claims:

First, Title VII precludes enforcement of the NYSE's compulsory pre-dispute arbitration requirements because the exchange's arbitration system, in actual practice, is not adequate to protect substantive Title VII rights. Rather, it often deprives plaintiffs of their rights to statutory fee-shifting, punitive damages and other substantive rights, is unduly expensive (with thousands of dollars in "forum fees" regularly imposed), and impermissibly subjects federally-protected antidiscrimination rights to the unfettered discretion of inadequately-trained, non-neutral arbitrators who are explicitly told that they are required neither to follow the law nor to explain the reasoning underlying their decisions.

Second, Ms. Duffield did not knowingly agree to arbitrate her statutory employment discrimination claims, as Title VII requires before any such agreement can be enforced, because the arbitration clause in the Form U-4 that Ms. Duffield was required to sign as a condition of her employment did not provide adequate notice that her right to litigate those claims was being waived;[1]

Third, Ms. Duffield did not voluntarily execute the Form U-4's compulsory pre-dispute arbitration clause, as Title VII also requires, because she was compelled to execute the Form U-4 and submit to mandatory arbitration as a non-negotiable condition of pursuing her chosen profession as a securities trader in the United States securities industry;

Fourth, the Form U-4 arbitration clause constituted an unconscionable contract of adhesion, because it required securities industry employees like Ms. Duffield to arbitrate all future Title VII claims in a forum that, in actual practice, was not adequate to vindicate substantive Title VII rights; and

Fifth, mandatory securities industry arbitration imposed an unconstitutional condition of employment on Ms. Duffield, because it deprived her of her rights under Article III and the Fifth and Seventh Amendments. Pet. App. 12a.[2]

---

[1] *See Renteria v. Prudential Ins. Co.*, 113 F.3d 1104 (9th Cir. 1997); *Prudential Ins. Co. v. Lai*, 42 F.3d 1299 (9th Cir. 1994), *cert. denied*, 116 S.Ct. 61 (1995). At the time Ms. Duffield signed her Form U-4 in 1988, the overwhelming weight of authority was that compulsory agreements to arbitrate future employment claims were unenforceable as to Title VII claims. Pet. App. 16a-18a.

[2] *See also* Conditional Cross-Petition for Writ of Certiorari in 98-409. As Ms. Duffield explains in her accompanying Cross-Petition, she also contended that her "unconstitutional conditions" argument precluded the district court from compelling arbitration of her state common law claims, in addition to her federal and state statutory claims. *Id.* at 9 & n.5; *see also* Pet. App. 12a.

2. *The District Court's Rulings*

Following extensive discovery in the district court, Ms. Duffield moved for summary judgment on her declaratory judgment claim that she could not be compelled to submit her Title VII and other claims to binding securities industry arbitration under the NYSE's rules and procedures (which were the *only* rules and procedures that Robertson Stephens sought to defend). Pet. App. 60a-81a.[3] The district court denied Ms. Duffield's motion and subsequently granted Robertson Stephens' motion to compel NYSE arbitration. Pet. App. 57a, 72a. However, recognizing "that a substantial ground for difference of opinion exists," the district court certified its orders for interlocutory appeal under 28 U.S.C. § 1292(b) and stayed its order compelling arbitration pending an appellate decision. Pet. App. 86a-87a.

3. *The Ninth Circuit's Decision*

The Ninth Circuit granted interlocutory review under 28 U.S.C. § 1292(b). Pet. App. 88a. After briefing and argument, the panel reversed the district court in part, affirmed in part, and remanded for further proceedings. Pet. App. 56a.

Addressing Ms. Duffield's challenge to the involuntariness of securities industry arbitration first, the court of appeals examined the historical and statutory evolution of employment discrimination arbitration and Congress' intent in amending Title VII in the Civil Rights Act of 1991. *See* Pet. App. 15a-45a. The court agreed with Ms. Duffield (and the EEOC, among others, as *amicus*

---

[3] By the time Ms. Duffield's case was litigated below, several cases had already held that the NASD's arbitration rules were not enforceable against plaintiffs pursuing Title VII claims because those rules, at least prior to 1993, did not make clear that any statutory discrimination claims were encompassed. *See Farrand v. Lutheran Broth.*, 993 F.2d 1253 (7th Cir. 1993); *Prudential Insurance Co. v. Lai*, 42 F.3d at 1305; *Renteria v. Prudential Ins. Co.*, 113 F.3d at 1107.

curiae) that Congress intended to preclude enforcement of involuntary, pre-dispute arbitration agreements encompassing future Title VII and state statutory employment discrimination claims. Pet. App. 46a-47a.

The undisputed facts demonstrated that Ms. Duffield was required to sign the Form U-4 and to submit to its mandatory arbitration requirement as a non-negotiable condition of working as a securities trader for *any* employer in the industry. Pet. App. 13a-14a. The panel therefore reversed the district court insofar as it had compelled Ms. Duffield to arbitrate her federal and state statutory discrimination claims. Pet. App. 56a. The court emphasized, however, that nothing in its decision precluded the enforcement of *voluntary* pre- or post-dispute agreements to arbitrate employment discrimination claims. Pet. App. 46a-47a.

Having ruled that plaintiff could proceed in federal court on her statutory discrimination claims because she had not voluntarily agreed to arbitrate them, the Ninth Circuit found it unnecessary to consider all but one of Ms. Duffield's remaining challenges (including her challenge to the adequacy of the securities industry arbitration forum), which presented alternative grounds supporting the same result. Pet. App. 22a n.7; *see supra* at 4-5. However, the panel did address Ms. Duffield's unconstitutional conditions argument, which also challenged the compelled arbitration of her state *common law* contract and tort claims. Pet. App. 48a-55a.[4]

---

[4] The Ninth Circuit's rejection of that argument is the subject of Ms. Duffield's Conditional Cross-Petition for Certiorari in No. 98-409.

REASONS FOR DENYING THE WRIT

I. THIS IS NOT AN APPROPRIATE CASE FOR ANSWERING THE QUESTION PRESENTED BECAUSE THE NEW YORK STOCK EXCHANGE HAS ABANDONED THE REQUIREMENT OF MANDATORY ARBITRATION OF STATUTORY EMPLOYMENT DISCRIMINATION CLAIMS.

As Robertson Stephens noted in its Petition, several weeks after the panel's decision in this case, the SEC approved a major change in the NASD's arbitration rules, eliminating the requirement that registered representatives must arbitrate statutory employment discrimination claims before the NASD. Pet. 29 n.14; *see* SEC Order Granting Approval to Proposed Rule Change Relating to the Arbitration of Employment Discrimination Claims, SR-NASD-97-77, SEC Release No. 34-40109 (June 22, 1998). The NASD rule change goes into effect January 1, 1999. *Id.*

After the SEC approved the NASD's rule change, the SEC Chairman issued a statement encouraging all remaining national securities exchanges "to promptly change their rules to conform to those of the NASD." *SEC Approves NASD Proposal to End Mandatory Arbitration of Bias Claims,* 121 Daily Labor Report (BNA) A-10 (June 24, 1998). On September 3, 1998, the NYSE's Board of Directors accepted that invitation, voting to amend NYSE Rule 347 (quoted in the Petition for Certiorari at 4) by adding the following provision:

> A claim alleging employment discrimination, including any sexual harassment claim, in violation of a statute shall be eligible for arbitration *only where the parties have agreed to arbitrate the claim after it has arisen.* [*New York Stock Exchange Moves to End Mandatory Arbitration of Bias Claims,* 173 Daily Labor Report (BNA) A-2 (September 8, 1998) (emphasis added).]

The proposed amendment, which would *preclude* arbitration of Ms. Duffield's statutory employment discrimination claims, is now awaiting formal SEC approval. *Id.*[5]

The SEC is likely to approve the amendment to NYSE Rule 347 in the near future. The probability is therefore very high that, if this Court granted certiorari, the case would become moot as to the Question Presented long before this Court decided that question. Granting certiorari in this case would therefore pose the risk of wasting the Court's resources and those of the parties and their supporting *amici curiae*. A grant of certiorari might also have the detrimental effect of leading some lower courts to stay litigation while awaiting the outcome of a case that ultimately would not be decided by this Court.

---

[5] The complete text of the proposed NYSE rule is set forth in the Appendix to this Brief in Opposition. As noted above, Robertson Stephens sought to compel arbitration *only* under the NYSE rules. Although Ms. Duffield's Form U-4 also required her to be bound by the NASD's arbitration rules, Robertson Stephens neither sought to compel arbitration under the NASD's rules (now amended), nor sought to defend the legal adequacy of the NASD's arbitration system. Pet. App. 60a, 69a-70a; *see supra* at 6. And, as stated, controlling Ninth Circuit precedent would have precluded NASD arbitration of statutory discrimination claims in any event. *See supra* at 6 n.3.

Even if Robertson Stephens had preserved the issue below, however, the recent amendment to the NASD's rules would moot Robertson Stephens' efforts to compel NASD arbitration. Under the NASD's new rule, registered representatives are not required to arbitrate before NASD panels any statutory discrimination claim filed in the NASD system after January 1, 1999. Ms. Duffield has not filed such a claim, and even if certiorari were granted and the Ninth Circuit were reversed, this Court would not be likely to issue its decision in this case by that date. Consequently, Robertson Stephens could not compel arbitration into the NASD system either. *See also* NASD Code of Arbitration Rule 10304 (authorizing NASD arbitrators "at any time during the course of an arbitration" to dismiss the arbitration and "refer the parties to their judicial remedies").

II. THIS CASE IS ALSO NOT THE RIGHT VEHICLE FOR ANSWERING THE QUESTION PRESENTED BECAUSE IT ARISES IN THE CONTEXT OF A UNIQUE MANDATORY ARBITRATION SYSTEM THAT HAS BEEN RECOGNIZED AS INADEQUATE TO VINDICATE STATUTORY DISCRIMINATION CLAIMS AND THAT IS INVOLUNTARILY IMPOSED ON AN INDUSTRY-WIDE BASIS.

Robertson Stephens' Petition for Certiorari wrongly assumes only two possible answers to the question whether Title VII, as amended by the Civil Rights Act of 1991, precludes employees from being forced, as a condition of employment, to sign "agreements" to arbitrate future statutory discrimination claims rather than to litigate those claims in court. The possible answers to that question are not limited to "yes" and "no"—which is a further reason why this securities industry case would not be the right vehicle for considering the Question Presented on certiorari even if the question were not likely to become moot.

A. Another possible answer to the Question Presented is that Title VII prohibits the enforcement of pre-dispute mandatory employment discrimination arbitration agreements *that relegate plaintiffs to an arbitral forum that is inadequate to vindicate their statutory rights.* The Ninth Circuit held, correctly we believe, that *no* involuntary pre-dispute arbitration agreement would be "appropriate and . . . authorized by law" within the meaning of § 118 of the Civil Rights Act of 1991, Pub. L. 102-166. At a minimum, however, this Court's precedents establish that unless a mandatory arbitration scheme is adequate to protect Title VII rights, it is neither appropriate nor authorized by law. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991), *quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985) (binding arbitration of statutory rights may only be compelled "so long as the prospective litigant effectively may vindicate [his or her] statutory

cause of action in the arbitral forum"); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 51, 56-58 (1974) ("there can be no prospective waiver of an employee's rights under Title VII" where the purported waiver requires the employee to adjudicate his statutory claims before a tribunal of labor arbitrators who are required to apply the "law of the shop," but not the law of the statute).

Robertson Stephens' Petition for Certiorari wrongly assumes that securities industry arbitration adequately protects statutory rights, asserting that the adequacy of NYSE arbitration was definitively resolved in *Gilmer*. Pet. at 14-15. But Robertson Stephens mischaracterizes the scope, analysis and holding of *Gilmer*. The Court in *Gilmer* rejected only a *facial* challenge to the adequacy of the NYSE arbitration scheme, and specifically stated that it was not pretermitting future, fact-based challenges to the adequacy of the securities industry mandatory arbitration scheme. Indeed, the Court invited such challenges "for resolution in specific cases." 500 U.S. at 33; *see Cole v. Burns Int'l Security Servs.*, 105 F.3d at 1482 ("Obviously, *Gilmer* cannot be read as holding that an arbitration agreement is enforceable no matter what rights it waives or burdens it imposes").

There was no evidence in *Gilmer* demonstrating how the securities industry arbitration system functioned in actual practice—nor could there have been, since *Gilmer* pre-dated virtually every securities industry employment discrimination arbitration award. This case, however, *does* provide such a detailed evidentiary record, based on almost two years of discovery into the actual *post-Gilmer* workings of securities industry employment arbitration. Ms. Duffield's challenges to the adequacy of the arbitral forum thus rested on a comprehensive evidentiary record that included: *every* 1990-95 employment discrimination decision issued by NYSE arbitration panels and most of the NASD employment discrimination decisions; virtually *all* the documentary materials used by the NYSE and

NASD in training securities industry arbitrators; lengthy depositions of the individuals in charge of the NYSE and NASD arbitration programs; and dozens of government documents concerning the development, scope, and impact of the securities industry's arbitration rules. The resulting record, which would provide an alternative ground for affirming the Ninth Circuit's judgment, establishes, *inter alia*, that:

• Securities industry arbitrators are expressly instructed in *The Arbitrators Manual* (the only training guide distributed by the NYSE and NASD to *all* of their arbitrators) that arbitrators are *not* required to follow "case precedent or statutory law" in deciding employment discrimination cases, but may substitute their own sense of "fairness" for the statutory standards that Congress enacted and the federal courts have interpreted. Appellant's Ninth Circuit Excerpts of Record ("ER"), Ex. D at 8.[6] This instruction creates an unacceptably high risk that what a securities industry arbitrator concludes is "fair" in deciding a Title VII claim will not be what a federal judge, or properly-instructed jury, would conclude is the proper result based on the extensive case law interpreting and applying the complex doctrines underlying Title VII —particularly because the arbitrators selected by the exchanges are mostly former securities industry executives who have no legal experience or training and who volunteer to serve as arbitrators for small honoraria from the exchanges. GAO Report HEHS-94-17, *Employment Discrimination: How Registered Representatives Fare in Discrimination Disputes* (March 30, 1994) at 8, 12-13; *see also Rosenberg v. Merrill Lynch*, 995 F.Supp. 190, 206-212 (D. Mass. 1998), *appeal pndg.* No. 98-1426 (1st Cir.) (analyzing the inherent structural biases in NYSE arbitration).

---

[6] Like virtually all the evidence Ms. Duffield presented to the district court, *The Arbitrators Manual* was not before this Court in *Gilmer*.

• The NYSE and NASD staff, and their arbitration training manuals, explicitly discourage securities industry arbitrators from including findings of fact, conclusions of law, or other written analyses in their awards—for the express purpose of *precluding* meaningful judicial review of those awards.[7] As demonstrated by the employment discrimination arbitration awards set forth in the record, securities industry arbitration awards (which are generally written by the exchange's staff, not the arbitrators, ER, Ex. D at 13-14 & nn. 26-27) are rarely longer than three sentences, almost never include any statement of reasons, and in multi-claim cases often do not explain the ground (if any) on which plaintiff prevailed. ER, Ex. G (Buck Depo. Ex. 32).

• To the extent information can be gleaned from these arbitration awards, it is that securities industry arbitrators, in actual practice, frequently do *not* follow Title VII. For example, Congress in Title VII sought to encourage victims of discrimination to vindicate their statutory rights, in part by shifting a prevailing plaintiff's reasonable attorneys' fees and costs to the losing defendant. *See* 42 U.S.C. § 2000e-5(k). The record shows, however, that securities industry arbitrators are *not* instructed that fee-shifting to prevailing plaintiffs is mandatory, and moreover, that securities industry arbitrators routinely fail to award mandatory statutory fees to prevailing Title VII plaintiffs. ER, Ex. D at 9 & n.20, Ex. G (Buck Depo. Ex. 32).

• Securities industry arbitration procedures also chill plaintiffs from pursuing statutory claims in the first place,

---

[7] *See, e.g., The Arbitrators, Manual,* ER, Ex. F (Mascucci Depo. Ex. I at 30) ("Once a decision is made, the staff member reduces the award to writing. Under present law, an arbitrator is not required to give a reason for the decision"); *If We Wanted Your Opinion, We Would Have Asked For It,* ER, Ex. F (Mascucci Depo. Ex. 12 at 2-3) (instructing NASD arbitrators that "awards that do not contain the panel's reasons" will eliminate any "basis for a court to vacate an arbitration award").

because the exchanges' SEC-approved rules allow arbitrators as a matter of course to impose oppressive arbitration "forum fees" on the parties (including prevailing plaintiffs in statutory cases). Such "forum fees," which accumulate at the rate of $3,000 per day of arbitration, have amounted to as much as $82,000 in a single discrimination case. ER, Ex. D at 11-13. In securities industry arbitration, then, individuals complaining of unlawful discrimination are being charged substantial sums for the right to bring Title VII claims, and are routinely being denied the right to recover those costs even if they prevail. By so skewing the economic balance that Congress deemed essential to federal anti-discrimination policy, securities industry arbitration undermines Title VII standards and improperly chills the exercise of protected statutory rights. *See Cole v. Burns Int'l Security Servs.*, 105 F.3d 1465, 1468, 1482-85 (D.C. Cir. 1997) (footnote omitted) ("If there is any risk that an arbitration agreement can be construed to require [an employee to pay the costs of arbitration], this would surely deter the bringing of arbitration and constitute a *de facto* forfeiture of the employee's statutory rights").

• None of the NYSE employment discrimination arbitration decisions between 1990-95 awarded punitive damages or injunctive relief. ER, Ex. F (Buck Depo. Ex. 32). Although it is impossible to know why no such relief was granted (because the awards lack any explanation of their reasoning), many of the arbitrator training materials in the record misstate the standards for awarding punitive damages. ER, Ex. D at 10-11 & n. 21.

• The securities industry's mandatory employment arbitration procedures also do not comply with many of the minimum procedural protections of the Due Process Protocol—a standard that the National Academy of Arbitrators, the American Arbitration Association, JAMS/Endispute, and several blue-ribbon government panels have advocated as setting forth the essential conditions

precedent to the enforcement of any arbitration agreement encompassing statutory discrimination claims.[8]

For these reasons, among others, the record below shows that securities industry arbitration is *not* simply an alternative forum that equally protects statutory rights—which is why several recent empirical surveys have concluded, based on statistical evidence, that "employers stand a greater chance of success in arbitration rather than in court before a jury."[9] These well-documented

---

[8] *See, e.g.*, National Academy of Arbitrators' Statement and Guidelines, 103 Daily Labor Rep. (BNA) E-1 (May 29, 1997); National Academy of Arbitrators' *Amicus Curiae* Brief to the Ninth Circuit in Support of Appellant; Commission on the Future of Worker-Management Relations Report and Recommendations, 1994 Daily Labor Rep. (BNA) 105 (June 3, 1994); Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship, 50 Disp. Resol. J. 37 (Oct.-Dec. 1995).

[9] *See, e.g.*, Bompey & Pappas, *Is There A Better Way? Compulsory Arbitration of Employment Discrimination Claims After Gilmer*, 19 Empl. Rel. L.J. 197, 208 (1994); *accord*, Bompey & Stempel, *Four Years Later: A Look At Compulsory Arbitration of Employment Discrimination Cases After Gilmer v. Interstate/Johnson Lane Corp.*, 21 Empl. Rel. L.J. 21, 43 (1995); L. Bingham, *Employment Arbitration: The Repeat-Player Effect*, 1 Empl. Rights and Empl. Policy Journal 1 (1997), *cited in* EEOC Policy at E-8 & n.17; D. Schwartz, *Enforcing Small Print To Protect Big Business: Employee and Consumer Rights Claims In An Age of Compelled Arbitration*, 1997 Wisc. L.R. 33, 64-66 (1977).

Although several industry groups have recently conducted studies aimed at suggesting that claimants fare equally well in securities arbitration, those studies fail to compare the cases that settle (which occurs far more often in court cases), fail to compare the amounts the plaintiffs recover (which are higher in court, and would be particularly high in cases involving well-paid securities brokers), and fail to consider the chilling effect of mandatory arbitration. Moreover, the industry's paternalistic suggestion that securities employers insist on mandatory arbitration because that system provides the greatest benefit to the victims of their discrimination lacks credibility. If Title VII claimants truly fared better in the arbitration system than in the judicial system, securi-

inadequacies of mandatory securities industry arbitration scheme are also one of the reasons the EEOC and the National Academy of Arbitrators have publicly criticized mandatory pre-dispute arbitration agreements extracted as a non-negotiable condition of employment against workers asserting statutory employment discrimination claims.[10]

The question whether securities industry arbitration is an adequate forum for vindicating Title VII rights is logically decided by this Court before Robertson Stephens' more abstract Question Presented, because it provides a narrower ground for upholding the judgment below. Moreover, to decide the Question Presented on the assumption that securities industry arbitration *does* provide an adequate forum would artificially divorce this case from the pertinent factual circumstances that gave rise to it.

The broad question whether Title VII precludes enforcement of individual employment contracts requiring arbitration of statutory claims in a forum adequate to protect statutory rights should be decided in the context of a case involving such a forum. The adequacy of securities industry arbitration, by contrast, is not an issue worthy of this Court's review—not the least because the current system will soon cease to exist.

---

ties employer defendants and their *amici* would not be fighting so hard to retain unilaterally imposed arbitration, and Title VII claimants and their *amici* would not be fighting so hard to eliminate it.

[10] *See EEOC, Policy Statement on Mandatory Binding Arbitration of Employment Discrimination Disputes as a Condition of Employment* (July 11, 1997); EEOC *Amicus Curiae* Brief to the Ninth Circuit in Support of Ms. Duffield; National Academy of Arbitrators' Statement and Guidelines, 103 Daily Lab. Rep. (BNA) E-1 (May 29, 1997); National Academy of Arbitrators' *Amicus Curiae* Brief to the Ninth Circuit in Support of Ms. Duffield.

B. Another possible answer to the Question Presented is that Title VII preludes compulsory arbitration where such a requirement is imposed not just by a particular employer, but across the board by all employers in an industry as a condition of pursuing employment in that industry as a whole. The right to pursue one's chosen profession is so fundamental as to be a protected "liberty" interest under the Fourteenth Amendment. *See Green v. McElroy*, 360 U.S. 474, 492 (1959). Ms. Duffield argued below that her "agreement" to arbitrate could not be considered "voluntary" because her execution of the Form U-4 arbitration clause was an explicit, non-negotiable condition—imposed by federal law and the rules of the exchanges, as well as by her employer—of her working for *any* U.S. securities industry employer. *See* Opening Brief of Plaintiff-Appellant in the Ninth Circuit at 28-30.[11]

Despite Robertson Stephens' assertions to the contrary, the Ninth Circuit was correct that pre-dispute arbitration agreements encompassing Title VII claims are not "appropriate and . . . authorized by law" unless they are entered into voluntarily. This Court has long recognized

---

[11] The Ninth Circuit thus began its decision by observing that Ms. Duffield's case "presents the issue whether employers may require as a mandatory condition of employment *in a chosen profession*—here, broker-dealer in the securities industry—that all employees waive their right to bring . . . claims in court . . . ." Pet. App. 9 (emphasis added).

In *Gilmer*, which pre-dated the effective date of the Civil Rights Act of 1991, this Court acknowledged that the plaintiff was required to sign a Form U-4 and register with an exchange, but suggested that the plaintiff might not have been required to sign the *arbitration clause* in the Form U-4. 500 U.S. at 33 (stating that there was "no indication that Gilmer . . . was coerced . . . into agreeing to *the arbitration clause in his registration application*"). This statement suggests that the *Gilmer* majority believed, contrary to the undisputed facts in the present record, that securities industry registered representatives had a choice whether to agree to the arbitration clause contained in the Form U-4, even if they had no choice whether to sign the Form U-4 itself.

that "arbitration . . . is a matter of consent, not coercion." *See, e.g., Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 81 (1995), *quoting Volt Info Sciences, Inc. v. Bd. of Trustees*, 489 U.S. 468, 479 (1989). Moreover, the legislative history of the 1991 Civil Rights Act (reviewed at Pet. App. 35a-45a), makes absolutely clear that Congress did not intend agreements covering Title VII employment claims to be enforced unless they were entered into voluntarily and with full knowledge of the employee.[12]

---

[12] While this Brief in Opposition is not the place to re-argue the Ninth Circuit's legislative history analysis, the Court should be aware that several courts have recently echoed the Ninth Circuit's conclusion that agreements to arbitrate statutory discrimination claims must be voluntary. *See, e.g., Bercovitch v. Baldwin Schools, Inc.*, 133 F.3d 141, 149 (1st Cir. 1998) (noting that "the legislative history [of the ADA, which is parallel to Title VII] evidences a concern that agreements to arbitrate should be voluntary"); *id.* at 150 (emphasis in original) ("the legislative . . . history expresses a concern for *involuntary* agreements to arbitrate"); *Ramirez-De-Arellano v. American Airlines, Inc.*, 133 F.3d 89, 90 (1st Cir. 1997) ("the threshold question for review must always be whether the agreement to arbitrate was, indeed, voluntary and intentional"). As Judge Posner explained for the Seventh Circuit in refusing to compel arbitration of a statutory discrimination claim pursuant to a collectively-bargained arbitration clause, "[i]t would be at least a mild paradox for Congress, having in another amendment to Title VII in 1991 conferred a right to a trial by a jury for the first time" to have intended to allow workers to be deprived of that right without their consent. *Pryner v. Tractor Supply Co.*, 109 F.3d 354, 363 (7th Cir.), *cert. denied*, 118 S.Ct. 294 (1997).

Moreover, Robertson Stephens' reliance on the floor comments of Senator Dole and Representative Hyde (Pet. 22)—two legislators who *opposed* § 118—ignores Sen. Dole's explicit statement that Congress intended to permit arbitration of Title VII claims only "where the parties *knowingly* and *voluntarily* elect to use these methods" (137 Cong. Rec. S15472, S15478 (daily ed. Oct. 30, 1991) (emphasis added)), and Rep. Hyde's similar assertion that the 1991 Civil Rights Act was meant to encourage statutory arbitration only where "the parties *knowingly* and *voluntarily* elect" to submit their dispute to such procedures. 137 Cong. Rec. H9548 (daily ed. Nov. 7, 1991) (emphasis added).

Ms. Duffield has the *strongest* possible case that her consent to arbitration was not voluntary. As the Ninth Circuit stated:

> Because *every* employer in the securities industry requires its employees to sign Form U-4, the form is *especially* violative of Congress' limitations. . . . It forces individuals like Ms. Duffield to opt for one of two "choices": sign the Form U-4 or seek another profession." [Pet. App. 46a (emphases added).]

The "choice" faced by Ms. Duffield was not simply whether to work for one employer or another, but whether to work in her chosen profession at all. Because that is the strongest possible context for finding a lack of voluntariness, it is also the least likely context to result in a decision applicable to the vast majority of workers currently bound by pre-dispute arbitration agreements. If the Court should decide to grant certiorari to decide the "voluntariness" question posed by Robertson Stephens, it should do so in a case presenting the more difficult factual context of an individual employer's arbitration requirement, which is the factual context applicable to most workers covered by mandatory arbitration "agreements." Otherwise, the risk exists that the Court's decision would be directly pertinent only to a securities industry arbitration requirement that will soon no longer exist.[13]

---

[13] Toward the end of its Petition, Robertson Stephens asks this Court to grant certiorari in order to decide the enforceability of arbitration agreements *outside* the securities industry context. Pet. 29 n.14. However, not only are those contexts not raised by the facts of this case, but there are also two other pertinent legal distinctions between mandatory securities industry arbitration and arbitration under employment contracts requiring arbitration as a condition of employment.

First, the Federal Arbitration Act, which Robertson Stephens relies upon so heavily in its Petition for Certiorari, is applicable to the securities industry Form U-4, but may not be applicable to contracts of employment. *See Gilmer*, 500 U.S. at 25 n.2 ("leav[ing] for another day" the question whether the FAA applies to employment contracts); *id.* at 36 (Stevens, J. dissenting) (explaining why

III. THE CONFLICT AS TO THE QUESTION PRESENTED MAY WELL RESOLVE ITSELF AND, EVEN IF IT DOES NOT, THIS COURT WOULD BENEFIT FROM THE VIEWS OF OTHER CIRCUITS.

The Petition for Certiorari exaggerates the extent of the conflict on the Question Presented. In the first place, nothing in the Ninth Circuit's decision conflicts with *Gilmer* itself, which pre-dated the effective date of the 1991 Civil Rights Act amendments and which invited fact-based challenges to the adequacy of mandatory arbitration schemes. In addition, the Ninth Circuit in the present case was the first federal circuit court to consider in depth the legislative history of the Civil Rights Act of 1991 in the context of a challenge to the enforceability of an involuntary arbitration agreement encompassing statutory claims. Since that decision issued, the Third Circuit reached a different conclusion (*see* Pet. 11-12 n.5, *citing Seus v. John Nuveen & Co.*, 146 F.3d 175 (3d Cir. 1998)), while other circuits have yet to weigh in on the Ninth Circuit's analysis—although cases squarely presenting the issue (as well as the other grounds upon which

---

the FAA does *not* apply to such contracts). Robertson Stephens' request that the Court hear this case to provide "guidance . . . on the application of the Federal Arbitration Act . . . to statutory discrimination claims" (Pet. 2), ignores that this Court has left open the threshold question whether the FAA applies to employment contracts at all.

Second, the securities industry arbitration requirement was attributable *to the government* (at least as of 1993 when the SEC adopted a regulation requiring securities traders to register with a national securities exchange). *See* Conditional Cross Petition for Certiorari in No. 98-409. That requirement therefore imposed an unconstitutional condition of employment in the industry—a separate ground for affirming the judgment below that has no application outside the context of the United States securities industry (as it existed before the recent NASD and NYSE rule changes).

Ms. Duffield challenged securities industry arbitration in this case) are pending in at least three other circuits.[14]

The *Seus* decision, moreover, is plainly inconsistent with *Gilmer* (and with the position of the EEOC, the federal agency with jurisdiction to enforce Title VII). The Third Circuit in *Seus* refused to consider the 1991 legislative history or indicia of legislative purposes relied upon by the Ninth Circuit, concluding that § 118 on its face endorsed arbitration and that "no amount of commentary from individual legislators or committees would justify a court in reaching the result [urged by the EEOC and adopted by the Ninth Circuit]." 146 F.3d at 182. This Court held in *Gilmer*, however, that a congressional intent to preclude a compelled waiver of the right to litigate statutory claims in court may be found in the text of a statute, *in its legislative history, or in an inherent conflict between compulsory arbitration and the statute's underlying purpose. Gilmer*, 500 U.S. at 26. The *Seus* court also denied the plaintiff in that case discovery into the actual workings of the securities industry arbitration system (146 F.3d at 187-88), thus precluding her from creating a record establishing the inadequacy of securities industry arbitration in actual practice. The absence of such a record may well have affected the Third Circuit's perception of the importance of ensuring that pre-dispute agreements to arbitrate Title VII claims are voluntary.

In any event, the present conflict may well be resolved once this Court decides *Wright v. Universal Maritime*

---

[14] *See, e.g., Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 1st Cir. No. 98-1426; *Desiderio v. NASD, Inc.*, 2d Cir. No. 98-6100; *Koveleskie v. SBC Capital Markets, Inc.*, 7th Cir. No. 98-1793. These are all securities industry cases, and like Ms. Duffield's case, they may shortly become moot as to the arbitrability issue. Although Robertson Stephens cites several other cases in support of its argument that a circuit conflict exists, none of them addressed the arguments based on the 1991 Civil Rights Act amendments or the other fact-based challenges that Ms. Duffield presented in this case.

Service Corp., No. 97-889, *cert. granted*, 118 S.Ct. 1162 (1998). The issue in *Wright* is whether a worker can be compelled to arbitrate a statutory claim of discrimination under the Americans with Disabilities Act pursuant to an arbitration clause in a collective bargaining agreement. Section 118 of the Civil Rights Act of 1991 (encouraging arbitration "where appropriate . . . and authorized by law") is also applicable to claims under the Americans with Disabilities Act. In *Wright*, both the respondent and the United States as *amici curiae* have briefed the voluntariness issue in the context of Congress' intent in adopting § 118. *See* Brief for Respondents and Brief for United States as *amici curiae* in No. 97-889. The Court's decision in *Wright* may therefore shed sufficient light on § 118 to resolve, or permit lower courts to resolve, any dispute over the Question Presented by Robertson Stephens. Even if the conflict persists, there will be other vehicles for resolving that question (*see, e.g.*, n.14, *supra*), and this Court would likely have the benefit of federal circuit decisions considering both the Ninth Circuit's analysis and the *Wright* decision.

CONCLUSION

For the foregoing reasons, the Petition for Certiorari should be denied.

Respectfully submitted,

CLIFF PALEFSKY
MCGUINN, HILLSMAN & PALEFSKY
535 Pacific Avenue
San Francisco, CA 95133
(415) 421-9292

MICHAEL RUBIN
(*Counsel of Record*)
SCOTT A. KRONLAND
ALTSHULER, BERZON, NUSSBAUM, BERZON & RUBIN
177 Post Street, Suite 300
San Francisco, CA 94108
(415) 421-7151

Attorneys for Respondent Tonyja Duffield

APPENDIX

APPENDIX A

Proposed Changes to New York Stock Exchange Arbitration Rules

Rule 347.

(a) Except as provided in paragraph (b), [A]*any* controversy between a registered representative and any member or member organization arising out of the employment or termination of employment of such registered representative by and with such member or member organization shall be settled by arbitration, at the instance of any such party, in accordance with the arbitration procedure prescribed elsewhere in these rules.

(b) A claim alleging employment discrimination, including any sexual harassment claim, in violation of a statute shall be eligible for arbitration only where the parties have agreed to arbitrate the claim after it has arisen.

Rule 600.

(f) Any claim alleging employment discrimination, including any sexual harassment claim, in violation of a statute shall be eligible for submission to arbitration under these Rules only where the parties have agreed to arbitrate the claim after it has arisen.

Brackets indicate deleted language; italics indicate new language.

Source: *Securities Week,* Vol. 25, No. 36 at 4 (Sept. 7, 1998)